Public Prosecutor v Md Nor bin Hamid

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO(1)42–5 OF 2002
LOW HOP BING J
29 DECEMBER 2003

Criminal Law — Anti Corruption Act 1997 s 11(a) — Ingredients to establish a prima facie case — Whether prosecution need to prove solicitation or demand by the accused — Whether presumptions can be invoked

The public prosecutor appealed against the decision of the sessions court judge to acquit and discharge the accused without calling for his defence on charges under s 4(a) of the Prevention of Corruption Act 1961 or the alternative charge under s 165 of the Penal Code and s 11(a) of the Anti Corruption Act 1997, or the alternative charge under s 165 of the Penal Code. The charge under s 4(a) of the Prevention of Corruption Act 1961 ('the first charge') was that the accused, a public servant had corruptly accepted gratification for himself, cash to the sum of RM849 from the complainant SP5, to buy a handphone as an inducement in ensuring that the supervision of the maintenance works of the Graha Maju building be carried out without any problem. The charge under s 11(a) of the Anti Corruption Act 1997 ('the second charge') was that the accused, a public servant had corruptly accepted gratification for himself, cash to the sum of RM270 from the complainant SP5, as an inducement in ensuring that the supervision of the maintenance works of the Graha Maju building be carried out without any problem. In respect of the first charge, the trial judge found that the prosecution had failed to prove that the accused had accepted the valuable thing in the form of cash amounting to RM849 from the complainant SP5 who was not present when the accused made the purchase of the handphone at the price of RM849, as a result of which the trial judge found that the sum of RM849 was not proved to have originated from SP5 or SP5's company. On the second charge, the trial judge found that the marked notes of RM270 in the form of trap money, were found on the accused who accepted them from SP5. However, the trial judge doubted that this was given to the accused as gratification, on the ground that the prosecution had failed to prove that the accused had demanded the said sum from SP5 as gratification and inducement to the accused in relation to the affairs of the accused's principal.

Held, allowing the appeal; setting aside the order of acquittal on the second principal charge and ordering the respondent to enter his defence on the second principal charge:

(1) In relation to the first charge, the two witnesses SP5 and SP6 testified to different sums of money which resulted in serious material contradictions which the prosecution must resolve but had not done so. Therefore, the decision of the trial judge was affirmed in relation to the first principal or alternative charge that the prosecution had failed to prove a prima facie case and to acquit and discharge the accused without calling the defence on the first principal or alternative charge (see paras 17–18).

(2) In relation to the second principal or alternative charge, for the purposes of adducing evidence in order to establish the offence under s 11(a) of the Anti Corruption Act 1997, Part VI of the Anti Corruption Act 1997, contains specific mandatory provisions to invoke presumptions in favour of the prosecution, in particular s 42(1) of the Anti Corruption Act 1997, which are identical to s 4(a) and s 14 of the Prevention of Corruption Act 1961 (see paras 20–23).

(3) For the purposes of establishing a prima facie case under s 11(a) of the Anti Corruption Act 1997, the prosecution has to prove: (1) a gratification has been accepted by the accused; (2) at the time of the acceptance, the accused is a member of a public body (see para 25); *Pendakwa Raya lwn Zakaria bin Mansor* [1997] 5 MLJ 505; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 and *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143 followed.

(4) Once it was proved that the money had been given and received by the accused, the presumption arose that the money had been given and received corruptly as an inducement or reward, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a balance of probabilities the test applied in civil proceedings (see para 26); *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 followed.

(5) The trial judge fell into a serious error in requiring the prosecution toprove the ingredient of solicitation or demand, when it has never been an ingredient under s 11(a). The solicitation or demand of the trap money by the accused is not an ingredient, but acceptance is (see para 27); *Public Prosecutor v Jamil bin Mahmod & Anor* [1998] 4 MLJ 681 followed.

[**Bahasa Malaysia summary**

Pendakwa Raya telah merayu terhadap keputusan hakim mahkamah sesyen untuk membebas dan melepaskan tertuduh tanpa memanggil untuk pembelaannya atas pertuduhan-pertuduhan di bawah s 4(a) Akta Pencegahan Rasuah 1961 atau pertuduhan alternatif di bawah s 165 Kanun Keseksaan dan s 11(a) Akta Pencegah Rasuah 1997, atau pertuduhan alternatif di bawah s 165 Kanun Keseksaan. Pertuduhan di bawah s 4(a) Akta Pencegahan Rasuah 1961 ('pertuduhan pertama') adalah bahawa tertuduh, seorang kakitangan awam telah secara rasuah menerima untuk dirinya, wang tunai berjumlah RM849 daripada pengadu SP5, untuk membeli telefon bimbit sebagai pendorong bagi memastikan bahawa pengawasan penyenggaraan kerja-kerja bangunan Graha Maju dijalankan tanpa sebarang masalah. Pertuduhan di bawah s 11(a) Akta Pencegah Rasuah 1997 ('pertuduhan kedua') adalah bahawa tertuduh, seorang kakitangan awam telah secara rasuah menerima untuk dirinya, wang tunai berjumlah RM270 daripada pengadu SP5, sebagai pendorong bagi memastikan bahawa pengawasan penyenggaraan kerja-kerja bangunan Graha Maju dijalankan tanpa sebarang masalah. Berhubung pertuduhan pertama, hakim perbicaraan mendapati bahawa

pihak pendakwa telah gagal untuk membuktikan bahawa tertuduh telah menerima barang berharga dalam bentuk tunai berjumlah RM849 daripada pengadu SP5 yang tidak hadir apabila tertuduh membuat belian telefon bimbit pada harga RM849, akibat dari itu hakim perbicaraan mendapati bahawa jumlah RM849 tidak dapat dibuktikan berasal dari syarikat SP5 atau SP5. Berhubung pertuduhan kedua, hakim perbicaraan mendapati nota-nota bertanda RM270 dalam bentuk wang perangkap, ditemui atas tertuduh yang menerimanya daripada SP5. Namun begitu, hakim perbicaraan meragui bahawa wang tersebut telah diberikan kepada tertuduh sebagai rasuah, atas alasan bahawa pihak pendakwa telah gagal membuktikan bahawa tertuduh menuntut jumlah tersebut daripada SP5 sebagai rasuah dan pendorong kepada tertuduh berkaitan urusan-urusan penting tertuduh.

Diputuskan, membenarkan rayuan tersebut; mengenepikan perintah pembebasan ke atas pertuduhan utama kedua dan memerintahkan responden memasuki pembelaan beliau ke atas pertuduhan utama kedua:

(1) Berkaitan pertuduhan pertama, kedua-dua saksi SP5 dan SP6 memberi keterangan terhadap jumlah wang yang berbeza mengakibatkan percanggahan-percanggahan material yang serius yang pihak pendakwa perlu selesaikan tetapi tidak berbuat demikian. Oleh itu, keputusan hakim perbicaraan adalah disahkan berkaitan pertuduhan utama pertama atau alternatif bahawa pihak pendakwa telah gagal membuktikan satu kes prima facie dan untuk membebas dan melepaskan tertuduh tanpa memanggil pembelaan ke atas pertuduhan utama pertama atau alternatif (lihat perenggan-perenggan 17–18).

(2) Berkaitan pertuduhan utama kedua atau pertuduhan alternatif, bagi tujuan mengemukakan keterangan bagi tujuan membuktikan kesalahan di bawah s 11(a) Akta Pencegah Rasuah 1997, Bahagian VI kepada AktaPencegah Rasuah 1997, mengandungi peruntukan-peruntukan khas mandatori untuk menggunakan andaian menyebelahi pihak pendakwa, khususnya s 42(1) Akta Pencegah Rasuah 1997, yang sama dengan ss4(a) dan s 14 Akta Pencegahan Rasuah 1961 (lihat perenggan-perenggan 20–23).

(3) Bagi tujuan membuktikan satu kes prima facie di bawah s 11(a) Akta Pencegah Rasuah 1997, pihak pendakwa hendaklah membuktikan: (1) satu rasuah telah diterima oleh tertuduh; (2) pada masa penerimaan, tertuduh merupakan ahli badan awam (lihat perenggan 25); *Pendakwa Raya lwn Zakaria bin Mansor* [1997] 5 MLJ 505; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 dan *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143 diikut.

(4) Setelah ia dapat dibuktikan bahawa wang tersebut telah diberikan oleh tertuduh, andaian yang timbul adalah bahawa wang yang diberikan dan diterima secara rasuah adalah sebagai pendorong atau ganjaran, dan ia adalah benar untuk tertuduh memberikan penjelasan yang jujur yang mana mahkamah akan mempertimbangkan ia adalah lebih berkemungkinan benar dari tidak, iaitu atas imbangan kebarangkalian ujian yang terpakai dalam prosiding sivil (lihat perenggan 26);

Thavanathan a/l Balasubramaniam v Public Prosecutor [1997] 2 MLJ 401 diikut.

(5) Hakim perbicaraan telah melakukan satu kekhilafan yang serius apabila menghendaki pihak pendakwa membuktikan faktor dalam permintaan atau tuntutan, apabila memang tiada faktor tersebut di bawah s 11(a). Permintaan atau tuntutan wang perangkap oleh tertuduh bukan satu faktor, tetapi penerimaan adalah (lihat perenggan 27); *Public Prosecutor v Jamil bin Mahmod & Anor* [1998] 4 MLJ 681 diikut.]

Notes

For cases on Prevention of Corruption Act 1961 s 4(a), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2627–2651.

Cases referred to

Attan bin Abdul Gani v PP [1970] 2 MLJ 143 (folld)
PP v Jamil bin Mahmod & Anor [1998] 4 MLJ 681 (folld)
PP v Yuvaraj [1969] 2 MLJ 89 (folld)
Pendakwa Raya lwn Zakaria bin Mansor [1997] 5 MLJ 505 (folld)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401 (folld)

Legislation referred to

Anti Corruption Act 1997 ss 11(a), 42(1), Pt VI
Criminal Procedure Code s 261
Prevention of Corrpution Act 1961 ss 4(a), 14

Appeal from: Criminal Trial No 61–3 of 2001 (Sessions Court, Melaka)

Saiful Hazmi bin Mohd Saad (Deputy Public Prosecutor, Badan Pencegah Rasuah) for the prosecution.
Karen Cheah for the accused.

Low Hop Bing J:

APPEAL

[1] Before me is the appeal by the learned public prosecutor against thedecision of the learned sessions court judge ('the trial judge') who on 7 August 2002 acquitted and discharged the respondent-accused ('the accused') without calling for his defence in respect of the following charges:

PERTUDUHAN PERTAMA

Bahawa kamu pada 7 Januari 1997, jam lebih kurang 10.30 pagi, di hadapan Ban Soon Communications Sdn Bhd, No 373, Taman Peringgit Jaya, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, sebagai agen Kerajaan Malaysia, iaitu, Juruteknik Awam, Perbadanan Kemajuan Negeri Melaka (PKNM), secara rasuah menyetuju terima daripada Nor Hamli bin Mat Nor untuk diri kamu sendiri suapan, iaitu, wang tunai RM849 (Ringgit Malaysia Lapan Ratus Empat Puluh

Sembilan Sahaja) bagi membeli telefon bimbit bernombor 010–6276457 sebagai dorongan untuk melakukan perbuatan berhubungan dengan hal ehwal prinsipal kamu, iaitu, memastikan penyeliaan kerja-kerja penyelenggaraan bangunan Graha Maju yang diuruskan oleh Nor Hamli bin Mat Nor bagi pihak Teamcoat Engineering Sdn Bhd seperti No Kontrak: PKNM/JKON/20–95 dijalankan tanpa sebarang masalah dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia Akta 57) (Disemak 1971) yang boleh dihukum di bawah s 4 Akta yang sama.

Melaka Aduan: 13/98

PERTUDUHAN PERTAMA (ALTERNATIF)

Bahawa kamu pada 7 Januari 1997, jam lebih kurang 10.30 pagi, di hadapan Ban Soon Communications Sdn Bhd, No 373, Taman Peringgit Jaya, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, yang menjadi penjawat awam, iaitu, Juruteknik Awam, Perbadanan Kemajuan Negeri Melaka (PKNM), telah menerima untuk diri kamu sendiri suatu benda berharga, iaitu, wang tunai RM849 (Ringgit Malaysia Lapan Ratus Empat Puluh Sembilan Sahaja) tanpa sebarang balasan daripada Nor Hamli bin Mat Nor yang kamu tahu ada kena mengena dalam urusan yang akan dijalankan oleh kamu, iaitu, menyelia penyelenggaraan bangunan Graha Maju yang diuruskan oleh Nor Hamli bin Mat Nor bagi pihak Teamcoat Engineering Sdn Bhd seperti No Kontrak: PKNM/KON/20–95, dan dengan itu kamu telah melakukan kesalahan di bawah s 165 Kanun Keseksaan dan boleh dihukum di bawah peruntukan seksyen yang sama.

Melaka Aduan: 13/98

PERTUDUHAN KEDUA

Bahawa kamu pada 31 Julai 1998, jam lebih kurang 11.40 pagi, di hadapan Bank Bumiputera Malaysia Bhd, Jalan Hang Tuah, di dalam daerah Melaka Tengah, didalam Negeri Melaka, sebagai agen Kerajaan Malaysia, iaitu Juruteknik Awam, Perbadanan Kemajuan Negeri Melaka (PKNM), secara rasuah menyetuju terima daripada Nor Hamli bin Mat Nor untuk diri kamu sendiri suapan iaitu, wang tunai RM270 (Ringgit Malaysia Dua Ratus Tujuh Puluh sahaja) sebagai suatu dorongan untuk melakukan perbuatan berhubungan dengan hal ehwal prinsipal kamu, iaitu, memastikan penyeliaan kerja-kerja penyelenggaraan bangunan Graha Maju yang diuruskan oleh Nor Hamli bin Mat Nor bagi pihak Teamcoat Engineering Sdn Bhd seperti No Kontrak: PKNM/KON/20–95 dijalankan tanpa sebarang masalah dan dengan itu kamu telah melakukan suatu kesalahan dibawah s 11(a) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) yang boleh dihukum di bawah s 16 Akta yang sama.

Melaka Aduan: 13/98

PERTUDUHAN KEDUA (ALTERNATIF)

Bahawa kamu pada 31 Julai 1998, jam lebih kurang 11.40 pagi, di hadapan Bank Bumiputera Malaysia Bhd, Jalan Hang Tuah, di dalam daerah Melaka, yang menjadi penjawat awam, iaitu, Juruteknik Awam, Perbadanan Kemajuan Negeri Melaka (PKNM), telah menerima untuk diri kamu sendiri suatu benda berharga, iaitu, wang tunai yang bernilai RM270 (Ringgit Malaysia Dua Ratus Tujuh Puluh sahaja) tanpa sebarang balasan daripada Nor Hamli bin Mat Nor yang kamu ketahui ada kena mengena dalam urusan yang akan dijalankan oleh kamu, iaitu,

menyelia penyelenggaraan bangunan Graha Maju yang diuruskan oleh Nor Hamli bin Mat Nor bagi pihak Teamcoat Engineering Sdn Bhd seperti No Kontrak: PKNM/KON/20–95, dan dengan itu kamu telah melakukan kesalahan di bawah s165 Kanun Keseksaan dan boleh dihukum di bawah peruntukan seksyen yang sama.

Melaka Aduan: 13/98

[My translation:

FIRST CHARGE

That you on 7 January 1997 at about 10.30am, in front of Ban Soon Communications Sdn Bhd, at No 373, Taman Peringgit Jaya, in the district of Melaka Tengah, in the state of Melaka, being an agent of the Government of Malaysia, to wit, a public technician, State Development Corporation Melaka (SDCM) corruptly accepted from Nor Hamli bin Mat Nor for yourself a gratification, to wit, cash RM849 (Ringgit Malaysia Eight Hundred and Forty-nine only) to buy a handphone No 010–6276457 as an inducement in relation to the affairs of your principal, to wit, ensuring that the supervision of the maintenance works on the Graha Maju building as managed by Nor Hamli bin Mat Nor on behalf of Teamcoat Engineering Sdn Bhd as in Contract No PKNM/KON/20–95 be carried out without any problem and that you have thereby committed an offence under s4(a) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act 57) (Revised 1971), punishable under s 4 of the same Act.

FIRST CHARGE (ALTERNATIVE)

That you on 7 January 1997, at about 10.30am, in front of Ban Soon Communications Sdn Bhd at No 373, Taman Peringgit Jaya, in the district of Melaka Tengah, in the state of Melaka, being a public servant, to wit, a public technician, State Development Corporation Melaka, accepted for yourself a valuable thing, to wit, cash RM849 (Ringgit Malaysia Eight Hundred and Forty-nine only) without consideration from Nor Hamli bin Mat Nor which you knew to be concerned in the business about to be transacted by you, to wit, supervision of maintenance on Graha Maju building which was managed by Nor Hamli bin Mat on behalf of Teamcoat Engineering Sdn Bhd as in Contract No PKNM/KON/ 20–95 and that you have thereby committed an offence under s 165 of the Penal Code, punishable under the same section.

SECOND CHARGE

That you on 31 July 1998, at about 11.40am in front of Bank Bumiputra Malaysia Bhd, Jalan Hang Tuah, in the district of Melaka Tengah, in the sate of Melaka, being an agent of the Government of Malaysia, to wit, Public Technician, State Development Corporation Melaka (SDCM) corruptly accepted from NorHamli bin Mat Nor for yourself a gratification, to wit, cash RM270 (Ringgit Malaysia Two Hundred and Seventy only) as an inducement in relation to the affairs of your principal, to wit, ensuring that the supervision of the maintenance works on the Graha Maju Building as managed by Nor Hamli bin Mat Nor on behalf of Teamcoat Engineering Sdn Bhd as in Contract No PKNM/KON/20–95 be carried out without any problem and that you have thereby committed an offence under s 11(a) of the Anti Corruption Act 1997 (Laws of Malaysia Act 575) punishable under s 16 of the same Act.

SECOND CHARGE (ALTERNATIVE)

That you on 31 July 1998 at about 11.40am, in front of Bank Bumiputra Malaysia Bhd, Jalan Hang Tuah, in the district of Melaka, in the state of Melaka, being a public servant, to wit, a Public Technician, State Development Corporation Melaka (SDCM) accepted for yourself a valuable thing, to wit, cash amounting to RM270 (Ringgit Malaysia Two Hundred and Seventy only) without consideration from Nor Hamli bin Mat Nor which you knew to be concerned in the business about to be transacted by you, to wit, supervision of maintenance on Graha Maju building as managed by Nor Hamli bin Mat Nor on behalf of Teamcoat Engineering Sdn Bhd as in Contract No PKNM/KON/20–95 and that you have thereby committed an offence under s 165 of the Penal Code, punishable under the same section.]

FINDING OF FACT

[2] In the grounds of decision, the trial judge found that there was no dispute that the accused is a public servant, being a public technician in the State Development Corporation Melaka, a statutory body of the Melaka State Government.

[3] In respect of the first charge, the trial judge found that the prosecution has failed to prove that the accused has accepted the valuable thing in the form of cash amounting to RM849 from the complainant SP5 who was not present when the accused made the purchase of the handphone at the price of RM849 as a result of which the trial judge found that the sum of RM849 was not proved to have originated from SP5 or SP5's company.

[4] Touching on the second charge, the trial judge found that the marked notes of RM270 were found on the accused who accepted them from SP5. However the trial judge doubted that this was given to the accused as gratification, on the the ground that the prosecution has failed to prove that the accused had demanded the said sum from SP5 as gratification and inducement to the accused in relation to the affairs of the accused's principal.

SUBMISSION FOR PROSECUTION

[5] In relation to the first charge, En Saiful Hazmi bin Mohd Saad, learned deputy public prosecutor, submitted that the prosecution has proved that before 7 January 1997, SP5 gave the money ie RM849 to the accused to buy a handphone and that on 7 January 1997, SP5 was present at the shop Ban Soon Communications Sdn Bhd ('the shop') where the accused bought a handphone Nokia 323 and showed it to SP5. It was also argued that SP5's evidence has been corroborated by documentary evidence in exh P5 and P12.

[6] In so far as the second charge is concerned, the stand taken for the prosecution is that the accused accepted cash in the sum of RM270 in the form of trap money exh P11 and so defence should have been called.

[7] In any event, it was submitted that a prima facie case has been established under each of the alternative charges.

CONTENTION FOR ACCUSED

[8] Ms Karen Cheah, learned counsel for the accused, contended that the prosecution has failed to prove the ingredients of s 4(a) of the Prevention of Corrpution Act 1961 ('the 1961 Act')under the first charge in that there was no evidence that the accused accepted the sum of RM849 from SP5 or his company.

[9] She added that the evidence of SP5 as an accomplice was not supported by corroborative evidence.

[10] In relation to the second charge, it is the defence's contention that the prosecution has failed to prove that the accused accepted RM270 from SP5 or his company.

[11] It was also the defence's contention that there are other facts which have weakened the case for the prosecution, eg the trap operation was conducted in a crowded public place where there was difficulty on the part of SP8 in making his observation, and that there was a break in the chain of evidence when the accused had a conversation with a friend.

DECISION ON APPEAL

Evidence relating to acceptance

[12] In the light of the diametrically opposite submissions for the prosecution on the one hand, and for the defence on the other, pertaining to the acceptance or non-acceptance of the two sums of money stated in the charges preferred against the accused, it is necessary for me to evaluate the evidence adduced in the court below in order to determine whether the trial judge has arrived at a correct finding in this crucial issue.

[13] The complainant SP5 has been a mechanical engineer of Teamcoat Engineering Sdn Bhd ('Teamcoat') from 1996 to 2000. His evidence was that on 7 January 1997, he went with the accused to the shop to buy a handphone Nokia 323 at the price of about RM750 in order to give it to the accused who asked for it some time in December 1996.

[14] SP5 informed the Managing Director of Teamcoat who agreed to credit RM1000 to SP5's account in Malayan Banking Bhd Jalan Hang Tuah, Melaka.

[15] Before 7 January 1997, SP5 gave an unspecified sum of money to the accused who went to the shop on his own to buy the handphone which he showed to SP5, to whom the accused returned the balance of RM250.

[16] SP5 added that after the purchase, the accused has asked for RM500 by way of monthly payments.

[17] Such is the material evidence which may be distilled from SP5 in support of the first principal or alternative charge. Although SP6, the employee of the shop, testified that the accused bought a Nokia 323 handphone from the shop at RM799 and paid RM50 for the screening of the caller's number,

making a total sum of RM849, such evidence does not seem to be corroborative of SP5's evidence. There is no trace of the sum of RM849 in SP5's evidence who in fact testified to sums of money other than that specified in the first principal or alternative charge. The sums of money adduced in the entire evidence of SP5 and SP6 are sharply contrasting. SP5 was alluding to RM1,000 being credited into his bank account, which he gave to the accused and the handphone was said to cost about RM750, and hence a refund of RM250 by the accused to SP5. On the other hand, SP6 was testifying on the purchase of the handphone by the accused who paid a total sum of RM849. There was nothing in SP6' evidence to connect the RM849 to the evidence of SP5. These two witnesses testified to different sums of money which add more riddles and continue to remain as mysteries to the trial judge and now to me in this appeal. In my view, there are serious material contradictions which the prosecution must resolve but had not done so in order to extricate itself from the jigsaw puzzle.

[18] Upon a careful evaluation of the aforesaid evidence, I am of the view that the prosecution has not shown any measure of success at the close of its case. In the circumstances, it is only reasonable and indeed correct for the trial judge as an arbiter of facts to come to the above finding in relation to the first principal or alternative charge and to conclude that the prosecution has failed to prove the essential ingredient of paying the sum of RM849 as alleged in that charge. I therefore affirm the decision of the trial judge that the prosecution has failed to prove a prima facie case and to acquit and discharge the accused without calling the defence on the first principal or alternative charge.

[19] In relation to the second principal or alternative charge, it is significant to observe that the trial judge has on the evidence correctly arrived at a specific finding of fact that the marked notes by way of trap money amounting to RM270 has been found on the accused and that the money was given by SP5 to the accused. However, the trial judge doubted that the money was a gratification to the accused and held that the prosecution has failed to prove that the money was demanded by the accused from SP5 as a gratification, by way of an inducement to the accused in relation to the principal's affairs.

[20] The second charge is based on s 11(a) of the Anti Corruption Act 1997 ('the 1997 Act') which reads as follows :

> Offence in giving or accepting gratification by an agent
>
> If —
>
> (a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;
>
> he shall be guilty of an offence.

[21] For the purposes of adducing evidence in order to establish the offence under s 11(a) the 1997 Act, Pt VI thereof contains specific mandatory provisions to invoke presumptions in favour of the prosecution, in particular s 42(1) which merits reproduction as follows:

> PART VI
>
> EVIDENCE
>
> Presumption in certain offences
>
> 42(1) Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[22] Sections 11(a) and 42 of the 1997 Act have actually replaced ss 4(a) and 14 of the 1961 Act respectively, which read as follows:

> 4 Punishment of corrupt transactions with agents.
>
> If —
>
> (a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;
>
> (b) …
>
> (c) …
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.
>
> PART III
>
> EVIDENCE
>
> 14 Presumption of corruption in certain cases.
>
> Where in any proceedings against a person for any offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, the gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved.

[23] It is to be observed that apart from the marginal notes to ss 11(a) and 42 of the 1997 Act and those in ss 4(a) and 14 of the 1961 Act, the substance of the corresponding sections in these two Acts are indeed identical.

[24] The submissions of the learned deputy and counsel do not seem to contain any authorities which call into consideration the purview and ambit of ss 11(a) and 42 of the 1997 Act. My own research reveals that there is no reported judgment in this respect. Hence, the leading authorities which have expounded on ss 4(a) and 14 of the 1961 Act being the corresponding equipollent provisions which are the precursors of ss 11(a) and 42 of the 1997 Act are relevant and applicable.

[25] In *Pendakwa Raya lwn Zakaria bin Mansor* [1997] 5 MLJ 505, one of the charges against the accused, a deputy superintendent of police, was under s 4(a) of the 1961 Act, ie that the accused had corruptly accepted for himself a gratification in the form of cash RM10,000 as an inducement in relation to his principal's affairs. In following the decision of the Privy Council in *PP v Yuvaraj* [1969] 2 MLJ 89, at p 91A–C; and of Sharma J in *Attan bin Abdul Gani v PP* [1970] 2 MLJ 143 at p 145, I held that for the purposes of establishing a prima facie case under s 4(a) of the 1961 Act, the prosecution has to prove the following ingredients :

(1) a gratification has been accepted by the accused;

(2) at the time of the acceptance, the accused is a member of a public body.

[26] High authorities abound in so far as the above principle is concerned. For example, the Supreme Court through the judgment of Chong Siew Fai CJ (Sabah and Sarawak) in *Thavanathan a/l Balasubramaniam v PP* [1997] 2 MLJ 401 also followed this principle as stated by the Privy Council in *Yuvaraj* and reaffirmed that once it was proved that the money had been given and received by the accused, the presumption under s 14 of the 1961 Act arose that the money had been given and received corruptly as an inducement or reward, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a balance of probabilities the test applied in civil proceedings (see pp421I–422A).

[27] The trial judge stated that the prosecution has failed to prove that the trap money in the sum of RM270 has been demanded by the accused from SP5 as a gratification. In this respect, it has been held in *Public Prosecutor v Jamil bin Mahmod & Anor* [1998] 4 MLJ 681 that under s 4(a) of the 1961 Act, solicitation or demand is not an ingredient, but acceptance is. In that case, the trap money recovered from the accused was not challenged, but the court below required proof of solicitation thereof, as a result of which the accused was acquitted without calling for his defence. On the learned public prosecutor's appeal, Jeffrey Tan J held that the trial court had fallen into serious error and ordered that defence be called.

[28] In the instant appeal, the trial judge fell into the same serious error in requiring the prosecution to prove the ingredient of solicitation or demand, when it has never been an ingredient under s 4(a), and I would add, by analogy, under s 11(a) of the 1997 Act.

[29] Having anxiously considered the grounds of decision of the trial judge in relation to the second principal charge, I regret being unable to

sustain the trial judge's order of acquittal without calling for the defence. In the circumstances, I allow the appeal, set aside the acquittal and order that the accused be called upon to enter his defence on the second principal charge under s 11(a) of the 1997 Act.

[30] As the then learned trial judge is now no longer performing judicial functions in the sessions court, I hereby invoke s 261 of the Criminal Procedure Code which reads as follows:

> 261 Change of Magistrate during hearing.
>
> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial :
>
> Provided as follows :
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial."

[31] I therefore order the accused to enter upon his defence on the second principal charge before the succeeding Melaka Sessions Court judge No 1 and that this case be mentioned in that court today.

Appeal allowed. Order of acquittal on the second principal charge set aside and respondent ordered to enter his defence on the second principal charge.

Reported by Sally Kee